85-1490

NO. _____

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1985

SUSAN BASCH; JONATHAN DAVID BASCH, and BENJAMIN ARI BASCH, Minors By Their Mother and Next Friend, SUSAN BASCH,

ESTATE OF PHILIP BASCH, SUSAN BASCH, Personal Representative,

JEROME J. SEIDENMAN

AND

SEIDENMAN & WEISS, P.A.,

Petitioners,

v.

WESTINGHOUSE CORPORATION,

Respondent.

PETITION FOR CERTIORARI

On Certiorari to the
Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED[1]

I

In a suit for negligent medical treatment, is plaintiff widow denied due process of law when the District Court precludes a physician eyewitness from testifying as an expert when he had been timely identified and deposed and where no prejudice to defendant was shown?

II

On those facts, is plaintiff's counsel denied due process of law when the District Court imposes monetary sanctions without a hearing which was timely requested?

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[1]All parties in the Courts below are named in the caption.

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OPINIONS BELOW

The opinion below is reported at 777 F.2d 165, and appears as Appendix C at p. C1 infra. The unreported trial court opinion is Appendix D, p. D1 infra.

JURISDICTION

This involves a common law diversity suit for death by wrongful act.

The final judgment of the Court of Appeals was rendered November 12, 1985. Rehearing was denied December 19, 1985.

Jurisdiction is based on 28 U.S.C. §1254(1). Cases supporting jurisdiction include Washington v. Texas, 388 U.S. 14, 19 (1967) (criminal defense testimony excluded); F.T.C. v. Flotill Products, 389 U.S. 179, (1967) (conflict between circuits), and Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 678 (1930) (opportunity to be heard).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "...no person shall be deprived...of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

This is an action for damages based on diversity of citizenship resulting from the death of Philip Basch, an employee of defendant Westinghouse Corporation, whom it transferred from Baltimore to Shiraz, Iran in 1975. It is alleged he died there in 1977 after being negligently treated by an Iranian physician selected by Westinghouse for treatment of its employees there.

Before pretrial discovery was complete, on October 11, 1983, the District Court held a hearing on a motion by Westinghouse to impose sanctions upon

plaintiff's counsel. Its theory was that its counsel were misled or prejudiced and caused extra expense because, when a retired physician was deposed in Florida by Westinghouse counsel on June 2, 1983, concerning his observations of decedent Basch in an Iranian hospital shortly before death, it was stated that he was not retained as an "independent expert witness," whereas a supplementary answer to interrogatory mailed June 1, 1983, simply listed the doctor as one who would testify as to his "factual observation" of decedent, in accordance with "the contents of his letter" (A. 96, App. E, p. E1 infra),[2] which the Court of Appeals

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[2]The prefix A refers to pages of the Fourth Circuit Appendix, a copy of which is tendered herewith.

noted had long been held by Westinghouse counsel (App. C, p. C31 infra).

Dr. K. M. Simonton, who observed the decedent in Iran shortly before his death, thoroughly set out his recollection in a letter to plaintiffs' original counsel, dated February 16, 1979, which was filed as Ex. 8 with the widow's deposition taken by defense attorney Donald Sharpe January 13, 1983.

At the outset of Dr. Simonton's deposition, he volunteered (A. 50): "I'm a witness of fact without prejudice to either side in this action, that the facts are what I recall of an event that took place some five years ago..." He could "render some opinions about the general quality of medical care available" but had "little information about the specific care in the case of Mr. Basch." He was not aware that

plaintiffs' original response to Interrogatory 14 stated that plaintiff might call him "as an expert witness on the issue of liability..."

At the conclusion of the October 11 hearing, the District Court ordered that sanctions would be imposed, citing authorities. Its November 22, 1983, order (App. D, p. D3-7 infra), after intervening correspondence (A. 185-203), directed "plaintiff's counsel to pay directly to Westinghouse $975 as the "difference between a senior partner's and an associate's preparation for and attendance at the deposition" of the Florida doctor, and $781 as the "cost of preparing motion for sanctions" filed by Westinghouse.

The deposed physician was ordered barred from testifying as an expert.

Defendant's Interrogatory 14 on expert witnesses (A. 24-25, 96, 108) was not limited to expert witnesses on departure from the standard of care of a doctor. It asked in part:

"Identify all experts whom you propose to call as witnesses at the trial of this case in connection with the cause and circumstances of the occurrence (liability issue)..."

Plaintiff answered March 14, 1983: "The Plaintiff is not decided on a medical expert at this time...The Plaintiff may also call K. M. Simonton, M.D., 951 Holly Lane, Boca Raton, Florida 33432 as an expert witness on the issue of liability in this case. There are no reports, resumes, or statements received from Dr. Simonton* Subject matter upon which he is expected to testify is based on his factual observation of Philip

Basch and what was being done for him. The grounds for his opinion are based upon his being a medical doctor and personal observation of Philip Basch."

The asterisk following Dr. Simonton's name referred Westinghouse counsel to Dr. Simonton's 1979 letter (App. E, p. E1 infra), which had been provided on January 13, 1983.

There were never any other writings by Dr. Simonton.

Westinghouse counsel was not satisfied with the answer and sought more information. In the meantime, it is clear that Westinghouse was eager to take the deposition of Dr. Simonton. On April 27, 1983, Westinghouse counsel wrote to petitioner Seidenman: ". . .we are interested in arranging a mutually convenient time to take Dr. Simonton's

deposition. Three dates on which we are available are Friday, May 13, 1983; Monday, May 16, 1983; and Tuesday, May 17, 1983.

And on May 17, 1983, noting counsel were "unable to agree to working out the arrangements for the deposition of" Simonton, lead counsel Sharpe served "a notice to take Dr. Simonton's deposition on June 2 at 10:00 a.m." (App. H , p. H4 infra)

On June 1, 1983, plaintiff's supplemented Answer 14 with no changes in substance (A. 96):

"S. 14. R. K. Simonton, M.D., will testify as to the contents of his letter dated February 16, 1979. There are no other reports, resumes or statements from Dr. Simonton. The subject matter contained in his report are based upon his factual observation of Philip Basch,

deceased and what was being done for him."

ARGUMENT

Imposition of attorney's fees alone might make this case appear too different from, and thus present a grievance less worthy of review, than the dismissal sanction cases generally reversed by this and other courts when an opportunity to be heard on specific demonstrated charges of misconduct is, as here, denied.[3]

But when a court ex meru motu adds preclusion from fully testifying by the most knowledgeable witness in a medical case, the court below has "denied to the

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[3] E.g., Wilson v. Volkswagen of America, 522 F.2d 798 (4th Cir. 1976); Societe Internationale v. Brownell, 357 U.S. 197 (1955). Compare the justified dismissal of a claim for undenied contempt of an order to appear for deposition in TWA v. Hughes, 332 F.2d 602 (2nd Cir. 1964).

plaintiff 'due process of law' -- using that term in its primary sense of an opportunity to be heard..."[4] Defendant never asked for this sanction.

Courts generally exercise their not unbridled discretion "in a fashion intended to encourage discovery rather than simply to punish for failure to make discovery." The "punishment [should] fit the crime" only. 8 Wright & Miller, Federal Practice & Procedure, §2284, pp. 765, 776. The due process clause applies to sanctions and procedure for imposing them. Id. at 759.

While upholding the salutary exercise of unabused discretion under revised Rule 37, this Court in National Hockey League v. Metropolitan Hockey

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[4]Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678 (1930).

Club, Inc., 427 U.S. 639, 640-3 (1970), noted that the Rule permits only such sanctions as "are just."

Even in cases unlike this one, involving disobedience of a Court's major discovery order, this Court has recognized the existence of a serious due process problem both before[5] and after[6] enactment of the Federal Rules.

Rule 37 as amended in 1970 provided "for sanctions against parties or persons unjustifiably resisting discovery."[7] There is not a scintilla of proof of such resistance here. And the Rule's

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[5]Hovey v. Elliott, 167 U.S. 409 (1897); Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909),

[6]Societe Internationale v. Brownell, 357 U.S. 197, 204 (1958).

[7]Advisory Committee Note, quoted in 4A Moore's Federal Practice §37.01[8].

limitation of sanctions to those that "are just" requires avoidance of "a drastic sanction that will prevent ajudication of the case on its merits except on the clearest showing that this course is required."[8] Each of the lower court decisions cited below by the District Court (A. 169-72) and Court of Appeals (App. C, p. C36-7 infra) involved some misleading, deceptive, evasive or incomplete answers[9] or ignoring discovery orders.[10] The District Court's sanctions-without-hearing action is flatly contrary to that required by the

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[8] 8 Wright and Miller, Federal Practice & Procedure, §2284, p. 772.

[9] E.g., Bell v. Automobile Club of Michigan, 80 F.R.D. 228, 230-31 (E.D. Mich. 1978).

[10] E.g., Airtex Corp. v. Shelley Radiant Ceiling Corp., 536 F.2d 145 (7th Cir. 1976).

Fourth Circuit in Wilson v. Volkswagen, 561 F.2d 494 (1977), and cases cited there from other circuits, requiring evidence for imposition of sanctions and apparently (except in the case of deliberate misconduct) requiring prejudice to the sanction seeker. The "unfortunate consequences" which the court finds to have occurred (p. C38, infra) -- arising from Westinghouse sending its lead counsel, Donald Sharpe, to depose the case's most important witness -- finds no support in the record. His May 17, 1983, letter (App. H2, referred to at p. C38, infra) shows nothing more than a squabble over timing of the deposition.[11]

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[11] And the court below (p. C33, infra) errs in concluding that both Mr. Sharpe and an associate went to the

(Footnote Continued)

At the sanctions hearing, the District Court asked Westinghouse counsel if they would have traveled to Florida to depose Dr. Simonton even if he had been listed as a "fact" witness. While lead Westinghouse counsel Sharpe was present, the question was answered by newly appointed (A. 4) counsel Garren. His "frank" answer (A. 137, App. G, p. G2, infra): ". . . we just don't know." Sharpe said nothing and was asked nothing. Thus, defendant utterly failed to prove prejudice.

(Footnote Continued)
deposition. He went alone. See A. 49, 99, 205.

I.

DR. SIMONTON MUST BE PERMITTED TO TESTIFY AS AN EXPERT

Rules 102 and 402 of the Federal Rules of Evidence demand this, except "as otherwise provided" by rule or statute. Rule 37(d) arguably, but not explicitly, permits deviation when to enter such orders "as are just" would correct discovery abuse. It would be patently unjust not to permit this physician to say, e.g., what he meant by "cyanotic" and "distended" (App. E, p. E1-2 infra), when the main case is tried on remand for partial reversal of the District Court's grant of summary judgment.

The partial gag rule imposed on Dr. Simonton here is the most drastic sanction short of dismissal.

Dr. Simonton's deposition of only 34 pages (A. 47) differed not at all from his 1979 letter (App. E, p. E1, infra). Dr. Simonton did testify as to the medical condition of Mr. Basch, which he observed, including the patient's difficulty in being transferred and his opinion that the hospital where Mr. Basch was treated was not the appropriate place for a patient with pneumonia, shown on his x-rays (A. 81-82).

Comments like Dr. Simonton observing Basch "cyanotic" and with "distended abdomen" (p. E1,3 infra) surely fall within Rule 702.[12]

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[12] "Rule 702. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or (Footnote Continued)

It cannot be seriously argued that concealing from the jury whatever this physician may be able to tell them about the medical aspects of this case is a "just" order within the meaning of Rule 37(d).

The Court of Appeals said (p. C39 infra) that the exclusion of Dr. Simonton as an expert "held" plaintiff's counsel "to their representations" in the second interrogatory answer" where no "non-expert" representation was made) "and at the deposition" (where no interference with defendant's questioning was made; A. 47-87).

Dr. Simonton was never listed as a proposed expert on the applicable standard of medical care.

(Footnote Continued)
education, may testify thereto in the form of an opinion or otherwise."

The statement of the court below that Westinghouse counsel were "thwarted in their efforts to obtain testimony from Dr. Simonton as an expert" (p. C 34 infra) is incorrect.

Lead counsel Sharpe would have explained it if it were true. His silence at the sanctions "hearing" raises a presumption that what he might have said at the sanctions hearing would be adverse to Westinghouse; Jacobson v. Julian, 246 Md. 549, 229, A.2d 108, 144 (1967); FRE 301.

There were no "representations in the second interrogatory answer and at the [Simonton] deposition" (C 39 infra) that justified muzzling him as the courts below did.

Dr. Simonton was not removed from expert witness status in interrogatory

answer 14 or supplemental answer 14, and the supplemental answer changed nothing of substance. He was always a physician who used medical terminology in a complete report which Westinghouse counsel had a full 91 days before Dr. Simonton was named in plaintiff's first answers to interrogatories.

Dr. Simonton was never represented as a physician who would testify that some other doctor departed from accepted standards of care. Westinghouse Interrogatory 14 did not even ask that question. Dr. Simonton's eyewitness observations as a physician included medical terminology which may have called for his expertise to aid the jury in understanding Mr. Basch's medical condition. He was listed in answer 14 for that very purpose. While he was never represented as a "standards of

care" expert, Dr. Simonton's observations had "expert" aspects to it which greatly assisted Dr. Bernard Heckman, petitioner's standard of care expert (A. 213; p. C34 infra) express opinions on whether or not the "standard of care" was followed. Thus one "liability issue" expert (Heckman) built his opinion on that of another (Simonton) (App. F, p. F3-6 infra).

Dr. Simonton's letter (App. E, p. E1) and deposition (A. 67, 69) said he found Mr. Basch's "respiration shallow; he was in "severe respiratory distress," so the doctor "ordered respiratory therapy" for Mr. Basch. Was this not expert testimony?

The exclusion of any otherwise admissible evidence he might offer would

violate Rules 401 and 402.[13]

II.

ATTORNEY'S FEES SHOULD NOT HAVE BEEN ASSESSED AGAINST PETITIONER ATTORNEYS

The Court of Appeals (p. C38 infra) felt a misunderstanding was indicated to plaintiff's counsel by defense counsel's May 17, 1983 letter (App. H , p. H2). Why it should be considered significant is a mystery; it reveals only a squabble about scheduling the Simonton deposition.

---

[13] "Rule 401. 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

"Rule 402. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

There was never a misunderstanding, and the mere coincidental timing of the June 1 supplementary answer, which bothered the District Court was utterly meaningless in view of its lack of significant change and defendant's freedom throughout the year, before and during the deposition, to fully question the witness.[14]

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[14]There was no evidence or representation that defendant's counsel tried to contact Dr. Simonton during the almost 5 months between the time they got his letter with his phone number and address until deposition. Defendant's statements that its counsel were hindered from talking to Dr. Simonton because he was "Plaintiff's expert" are simply false. DR 7-103 ("Communicating With One of Adverse Interest") and a recent ruling of the Ethics Committee of the Maryland Bar Association show this. Said the committee this year in another case (Ethics Docket 85-29): "The doctor does not appear to be a party to the litigation but is merely serving as an expert witness for the plaintiff. For these reasons it is the opinion that the

(Footnote Continued)

To discourage true deception or other abuse is unquestionably desirable. To punish by monetary sanction, and thus besmirch the good and long-standing reputation of, plaintiff's attorney, without the evidentiary hearing asked for by appellants (A. 180), opposed by Westinghouse (A. 186), and denied by the District Court (A. 190), is not "just" within the meaning of FRCP 37. Petitioner Seidenman specifically requested an evidentiary hearing to challenge the fees and expenses claimed and to have an opportunity to show that Westinghouse lead counsel, Sharpe, not a lesser associate, would indeed have gone

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(Footnote Continued)
actions of the defendant's attorney [in contacting him] do not appear to conttitute a violation of the Code." Md. Bar Journal, Vol. 18, #3, March, 1985, p. 26.

to Florida for the deposition of Dr. Simonton. That was arbitrarily denied. The District Court, and the Fourth Circuit, in approving denial of an evidentiary hearing, required by its prior holdings denied petitioner due process.

Such action is flatly contrary to that required by the Fourth Circuit in Wilson v. Volkswagen, 561 F.2d 494 (1977), requiring evidence for imposition of sanctions and apparently (except in the case of deliberate misconduct) requiring prejudice to the sanction seeker, and by similar rulings in other circuits.

CONCLUSION

The sanctions imposed were not justified. They pose a substantial threat to the independence of the bar of the entire Republic, to the concept of

due process of law, and to the fairness of federal litigation.

Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-2149

December 16, 1985

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Chief Judge Winter and Judge Gordon, Senior United States District Judge, sitting by designation.

For the Court,

John M. Greacen
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

November 12, 1985

NOTICE OF JUDGMENT

Judgment was entered in Case No. 83-2149

84-1821 this date.

John M. Greacen
CLERK

APPENDIX C
COURT OF APPEALS DECISION
December 16, 1985

MURNAGHAN, Circuit Judge:

I

The instant appeal arises out of an action commenced by Susan Basch, her children, and the estate of her deceased husband, Philip Basch. At the time of his death, Mr. Basch worked for Westinghouse Electric Corporation in Iran. He became ill and was treated by an Iranian doctor who had been retained and recommended by Westinghouse. Plaintiffs seek to hold Westinghouse liable for the allegedly inadequate medical care that caused the death of Mr. Basch.

II

On July 17, 1975, Mr. Basch returned to Westinghouse to accept a new position with the company in Shiraz, Iran. Before leaving the United States, the Basch

family participated in an orientation program for Iranian-bound Westinghouse employees. At the program they received a general information booklet about Shiraz and were advised that "adequate" medical attention would be available from physicians who had been trained in the United States and Europe. Although the booklet contained names and numbers of various doctors, the publication stated that Westinghouse "was not endorsing or recommending" the listed professionals. Mrs. Basch stated in an affidavit, however, that she had been told by a Westinghouse official that a "capable company physician" had been employed in Shiraz.

On November 1, 1975, a few months after the Basches arrived in Iran, a memorandum was sent to the Westinghouse employees informing them that the company

had a contract with Dr. Salami.[1] The

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[1]The memo provided:

> Dr. Salami will provide Westinghouse employees and families medical service and advice on a 24 hour, 7-day-a-week basis. In the event Dr. Salami is unavailable for any reason, it will be his responsibility to designate another doctor equally qualified.
>
> The Doctor will have an English speaking nurse, Miss D. Jesmani, secretary, and receptionist for handling appointments and messages at his office and at the out-patient clinic of Nemazee Hospital.
>
> The Doctor will fill out insurance forms for employees when acting as the Employee Medical Doctor. These forms should be turned in by the employee to the Westinghouse office in Shiraz to be forwarded. All medical bills must be paid by the employee. The employee then will be reimbursed by the insurance carrier.
>
> Dr. Salami will be able to give you and your family the required vaccination and immunization shots, so bring in your shot card for review.

(Footnote Continued)

agreement between Westinghouse an

(Footnote Continued)

Medical treatment by Dr. Salami a required - when other than routin physical (does not include Lab o X-ray) will be filed separately fo all expenses incurred.

If you or your family have a emergency hospitalization, yo should call Dr. Salami and he wil call ahead to assist in you admittance to Nemazee Hospital an will follow up on your treatmen there.

Dr. Salami comes to us highl recommended, and has received hi entire medical schooling an internship in USA. He is a ver qualified internist and has onl recently returned (18 months) t Iran.

We feel by having Dr. Salam available you will be able to hav many of your medical quesiton answered. He will also be able t assist you in obtaining appointment with other medical specialists yo may need.

It is not recommended to wait til (sic) an emergency take (sic) plac to contact Dr. Salami but becom aquainted (sic) now so he can hav at least a medical record of you an your family when needed.

(Footnote Continued

Dr. Salami provided that he would receive a monthly fee for providing vaccinations, employment related physical examinations and general consulting and referral services and that he would be available to provide any other medical services requested by employees on a twenty-four hour basis. With respect to "non-

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(Footnote Continued)

> Westinghouse Employees and dependants have no obligation to use this Doctor or any doctor the employee is referred to by Dr. Salami.
>
> Appointments are necessary and anything other than emergency it is advisable to call ahead. Children under 12 years will be referred to a pediatrician.
>
> We will need yours and your family's names and blood type. We need this information to furnish Dr. Salami and our office. Turn in this information to our Westinghouse Shiraz Office. For any questions regarding Dr. Salami or blood type contact Bob Haisley.

routine" physicals and medical services, employees were to be billed separately.[2]

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[2]The contract provided:

EMPLOYEE AND DEPENDENT

A. Vaccinations

1. Vaccinations will be given to all Westinghouse . . . employees and their dependents, in compliance with their requirements and World Heath Organisation (sic) regulations.

2. Vaccinations of personnel and families when local health conditions indicate that such a protection is needed.

3. Routine vaccinations and immunisations (sic) that will be available are:

Cholera
Typhoid, paratyphoid
Polio
Diphteria (sic)
Tetanus
Smallpox
Gamma Globulin for infectious hepatitis

4. Medical examinations for pre-employment, check ups and consultancy (sic) purposes.

(Footnote Continued)

Mrs. Basch stated in her deposition that

(Footnote Continued)

5. Medical treatment as required - when other than routine physicals the employees will be billed separately for all expenses incurred.

6. Referral services to other physicians.

7. Other related medical services.

In the event Dr. Salimi (sic) is unavailable for any reason it will be his reaponsibility to designate another doctor equally qualified to fill in for him. The doctor will be available to provide medical services on a 24 hour basis 7 days a week.

The doctor will retain the services of an English speaking secretary, receptionist or other employee capable of handling routine appointments and messages etc.

The doctor will have a telephone in the office and home and the numbers will be made available to all employees.

The doctor will fill out insurance forms for employees and or their dependents without additional charge to the company or to the employees when acting as the employees[']

(Footnote Continued)

she understood (1) there was no obligation to use Dr. Salami and (2) if they used Dr. Salami for "general medical services" they had to pay him directly for his service.

On February 1, 1977, Mr. Basch developed a respiratory problem. He visited Dr. Salami on February 3, and received a prescription. On February 5 Mr. Basch, who was not improving, returned to Dr. Salami for an x-ray and additional medication. On February 6 Mr. Basch decided not to continue his treatment with Dr. Salami and, upon the

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(Footnote Continued)
medical advisor.

. . .

Westinghouse shall [not] direct [its] employees or their dependants to utilise (sic) the services of the Doctor for any other reasons than are included in this Agreement.

advice of a visiting American physician, visited another doctor and was admitted to Hafez hospital.

Mr. Basch continued to deteriorate. On February 10, 1977, Mrs. Basch sought the assistance of Westinghouse in an attempt to transfer her husband to an American military hospital in Tehran. She also sought to have a doctor fly in from Tehran. In response, Westinghouse told Mrs. Basch that the American military hospital would not accept civilians and that a doctor from Tehran would only be able to supervise Mr. Basch's case for one day. The company instead offered to have Dr. Salami come to the Hafez hospital or to transfer Mr. Basch to another hospital. The Basches declined both offers.

By February 11, 1977, Mr. Basch was too ill to travel. He died on February 13, 1977.

Plaintiffs filed the present action on February 10, 1980, alleging that Westinghouse was liable for the asserted negligence of Dr. Salami and Hafez Hospital. In Counts I and II of the complaint, plaintiffs alleged causes of action for wrongful death and negligence. In Count III plaintiffs asserted that Westinghouse was in breach of a contractual obligation to supply adequate and proper medical care to Mr. Basch.

After the complaint was filed, Westinghouse moved, pursuant to Federal Rule of Civil Procedure 44.1, for a determination of the applicability of foreign law. The district court granted the motion, ruling that Iranian law governed all causes of action. Westinghouse then sought a dismissal of the complaint. The district court granted the motion in part, holding that

Westinghouse could not be held liable for the alleged negligence of the hospital.

The court did not dismiss the allegations concerning the defendant's responsibility under Iranian law for Dr. Salami's alleged negligence. At a pretrial conference, the parties were asked to submit memoranda concerning Iranian law. Both sides retained experts who analyzed the issues pending before the court. On June 25, 1984, the district judge entered summary judgment in favor of Westinghouse on the causes of action in tort.[3] With respect to the

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[3]Following a March 19, 1984 hearing on the question of Iranian law, the district court ruled from the bench in favor of defendants. On March 21, 1984, at plaintiffs' request, the court agreed to reconsider its rulings and invited full briefing on the issues. On June 25, 1984 the district court issued a written memorandum opinion in which it adhered to its original ruling.

contract claim, the court granted only partial judgment for Westinghouse. For purposes of summary judgment, the court held that the record was insufficiently developed to determined a) whether there was a contract to provide adequate medical care or b) whether Westinghouse was in breach of the contract. The district court granted summary judgment on the question of damages under Iranian law of contracts, ruling that loss of profits and consequential damages were not recoverable.

Thereafter, the district court granted plaintiffs' motion for entry of final judgment and certified the appeal pursuant to 28 U.S.C. §1292(b).[4]

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[4]It appeared evident to the plaintiffs that, if damages were limited so as not to include loss of profits and consequential damages, the game was not worth the litigation candle.

III

The first issue on appeal is whether there is any theory of Iranian law under which Westinghouse could be held liable in tort for the alleged negligence of Dr. Salami.[5]

The parties agree that the principal basis for a claim imposing tort liability on Westinghouse is Article 12 of the Civil Responsibility Law of Iran ("CRLI"). Under Article 12 an employer may be held vicariously liable for the

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[5]Pursuant to Rule 44.1 the district court considered submissions from the Iranian lawyers retained by plaintiffs and defendant and determined that Iranian law did not support plaintiffs' two negligence causes of action. A determination concerning the law of a foreign country is a ruling on a question of law and is freely reviewable on appeal. See United States v. First National Bank of Chicago, 699 F.2d 341, 344 (7th Cir. 1983). See generally 9 C. Wright & A. Miller, Federal Practice and Procedure §2446 (1971).

tortious actions of its employees which occur in the course of employment. The uncontested translation provides that "Employers . . . are responsible for the compensation of damages caused by their white-collar and/or blue-collar workers in the course of duty or as a result thereof . . . ." Article 12 defines "employer" and "worker" by reference to Iran's Labor Law of 1965. Article 1 of the Labor Law defines "worker" as "an individual who works in any capacity under the instruction of an employer against the payment of salary and wages." "Employer", defined in Article 3, is one "under whose instructions and for whose account a worker works." Thus, as the district court reasoned, the Article 12 inquiry is whether there was an employer-employee relationship between Westinghouse and Dr. Salami, i.e., one where

Westinghouse instructed Dr. Salami in the carrying out of his duties.[6]

Both experts, in their initial submissions to the district court, agreed that Westinghouse and Dr. Salami were not in an employer-employee relationship within the meaning of the Iranian Labor Laws. Westinghouse's expert, Mr. Mahmoud Katirai, concluded that Dr. Salami did not work "under the instruction" or "for the account of" Westinghouse, but simply was an independent contractor.[7]

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[6]No argument is made that Article 12 extends liability to Mr. Basch as an employee injured in the course of duty.

[7]Mr. Katirai, quoting from a leading treatise on Iranian Labor Law, explained that the phrase "under the instruction" requires "that the employer not only determines what task is to be performed, but controls the manner or procedure by which it is done." The key element is the employer's ability to supervise or control. According to Mr. Katirai the element of control is normally absent in

(Footnote Continued)

Plaintiffs' expert, Mr. Bahman Lotfi also concluded that Dr. Salami was a independent contractor because (1) he di not work exclusively for the defendan and (2) the doctor's office was not th employer's "workplace".[8]

(Footnote Continued)
a retainer fee arrangement with physician.

[8]Mr. Lotfi concluded:

> Although pursuant to a contrac Dr. Salami performed a number o specified tasks for the Defendant, still do not believe he could b classified as an "employee" subjec of Article 1 of the Labor Act. . . Under the circumstances Dr. Salam will be considered an independen contractor or an agent of th Defendant rendering specifi services on a fixed fee basis.

Subsequent to the district court' initial March 19, 1984 decision t dismiss Counts I and II and its decisio to reconsider the issues after ful briefing, plaintiffs went back t Mr. Lotfi for a second opinion. In March 28, 1984 memorandum, Mr. Lotfi perhaps not surprisingly, changed hi mind and came to the conclusion tha

(Footnote Continued

The undisputed facts support the experts' conclusion that Dr. Salami was not an employee of Westinghouse. Dr. Salami was retained by Westinghouse on a contractual basis to provide certain employment-related medical services--vaccinations and physicals. By contract he also was available to provide general medical treatment on a twenty-four hour basis. However, unlike the listed services, which were covered by the monthly retainer fee, "medical treatment as required" was billed to the Westinghouse employee separately. Thus, although Dr. Salami was "on-call" twenty-four hours a day, Dr. Salami's treatment

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(Footnote Continued)
Dr. Salami was an employee. Although Lotfi explained that his change of heart was based on the submission of "additional" facts, his first opinion appears to us to have somewhat more probative value.

of Mr. Basch for pneumonia undisputedly was outside the scope of the medical services contract; his services were based on a "separate agreement" between Mr. Basch and Dr. Salami.

Plaintiffs argue that certain terms of the contract support the inference that Dr. Salami was "controlled" by Westinghouse. The inference, however, is not probative of employee status for every independent contractor is "controlled" by the terms of the contract. Here, Westinghouse--for the convenience of its employees--purchased the right to have an English-speaking doctor available on a twenty-four hour basis. Moreover, the company made it clear in the November 1, 1975 memorandum that Westinghouse employees had no obligation to use Dr. Salami.

Plaintiffs further argue that a jury could find that Dr. Salami's office was

part of the workplace of Westinghouse as defined by Article 5 of the Labor Act.[9] The argument, as the district judge concluded, really begs the question in that "workplace" is defined as "a place where a workman works under the instructions of an employer." As noted above, Dr. Salami, when treating Mr. Basch for pneumonia, was acting outside the scope of the medical services agreement and was treating him as a private patient in his own office. He was not, in any sense, acting "under the instruction" of Westinghouse. Consequently, we affirm the ruling that Westinghouse is not liable under Article 12 of the CRLI.

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[9]Article 5 of the Labor Act of Iran defines workplace as "a place where a workman works under the instructions of an employer."

Plaintiffs advance two alternativ theories of liability: implied agenc and negligent hiring.

Plaintiffs candidly admit that ther is nothing in the CRLI which discusse the law of implied agency. They point however, to Article 3 of the Civi Procedure Code of Iran which states tha "where the existing laws of the countr are not perfect or are not explicit . . or there does not exist" an applicabl law, Iranian courts are "bound to settl the case in accordance with th spirit . . . of existing laws, an established usages." Because the CRLI i silent on implied agency, plaintiff argue that Article 3 of the Civi Procedure Code authorizes the court t look to other sources, including th Civil Code of Iran. Article 658 of th Civil Code, say plaintiffs, clearl recognizes the concept of implied agency

Thus, because there are facts which would support a jury finding of implied agency, plaintiffs contend that summary judgment should not have been granted.

The unstated premise of plaintiffs' argument--that Iranian law is silent on the question of the principal's tort liability for the acts of his agent--is fallacious. Defendant's legal expert points out that the Iranian notion of respondeat superior in tort is extremely narrow. He states that the only area where vicarious tort liability is recognized is Article 12 of the CRLI, i.e., casting liability on the employer. Westinghouse, as we have previously pointed out, was not an employer of Dr. Salami. Otherwise, the prevailing view rejects vicarious tort liability under the Civil Code. Consequently, what plaintiffs call a lacuna is more accurately an express limitation on

liability under Iranian law.[10] Indeed in reaching a contrary conclusion plaintiffs' expert relied on Dr. Ghaem Maghami's leading treatise 1 Houghough-e-Ta 'ahodat [Laws of Obligations] 257, 261 (1976). However

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[10] Mr. Katirai wrote:

> Vicarious liability as created by CRLI is an exception to the general principle of Iranian law that "no one is liable for the actions of another." (Adle Mustafa, Hogough-e-Madani [Treatise on Civil Law] at 140.) . . . . The whole doctrine of vicarious liability as developed in the Anglo-Saxon legal system is foreign to the Islamic system. Thus its introduction through CRLI is to be carefully restricted to the specific situations expressed therein. This conclusion is further supported by the fact that vicarious liability is an exception to the general rule of Iranian law. Therefore, as stated by Dr. Langeroudi and other Iranian scholars, it may not be broadly interpreted to include situations not specified in the exception. Dr. Ghaem-Maghami states: "Such [vicarious] liability is not found in the Civil Code."

defendant's expert, quoting from the very same source, noted that Dr. Ghaem-Maghami has in fact rejected the theory of tort liability under the Civil Code relied upon by plaintiffs' expert.[11]

We also conclude that plaintiffs' theory of negligent hiring of an independent contractor is not recognized in Iranian law. The only authority mentioned by plaintiffs is a quote from Dr. Ghaem-Maghami's commentary.[12] The

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[11]Furthermore, the liability of a principal under Articles 658 and 674 of the Civil Code is contractual and has not been extended to tortious acts. Iranian commentators are unanimous that, under Article 674, principals are only responsible for the acts duly authorized by contract or through subsequent ratification.

[12]According to Dr. Ghaem-Maghami:

> Where an employer delegates the management of a task to another, who fails to take such precautions, or where such precautions have been

(Footnote Continued)

district court properly noted, however that the quotation relied upon b plaintiffs' experts describes th liability of an employer to third partie for a negligent or wrongful act of a employee.[13] As stated above, there is n employer-employee relationship here Thus, plaintiffs' argument is inapposite

IV

The district court granted partia summary judgment on Count III on th scope of damages. Relying on defendant' Iranian law expert, the court held tha

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(Footnote Continued)

taken, but the observance of suc precautions is not proved, th employer will be responsible.

1 Houghough-e-Ta 'ahodat [Laws o Obligations], at 261.

[13]The December 28, 1983 submissio by plaintiffs' expert made it clear tha Dr. Ghaem-Maghami's text was describin an employer's liability for negligen hiring of an employee.

damages for plaintiffs' breach of contract claim are limited to "medical expenses obtained by the employee from other sources as a result of Defendant's breach of an agreement to provide medical services." According to the district court, lost profits (loss of salary) and consequential damages cannot be recovered.

We do not agree with the district court's reading of the applicable authorities. Article 728 of the Civil Procedure Code of Iran, which governs the issue of damages for a breach of contract,[14] plainly permits "loss of profits":

> In respect of the foregoing Article the court shall pass a judgment for

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[14]We do not accept plaintiffs' argument that Article 6 of the CRLI alternatively defines the scope of
(Footnote Continued)

> recovery of damages only in cases where the claimant of indemnity establishes that losses have been inflicted on him as the direct result of non-fulfillment of the obligation or delay in the same or non-delivery of the judgment debt. The losses could be the result of loss of property or loss of profits which could have been derived from the performance of obligation.

Contrary to the district court's opinion Mr. Katirai's analysis of Article 72 nowhere states that lost profits an consequential damages are absolutel barred in a contract action. Citin several leading commentators, Mr. Katira instead states that damages for contract breach are "limited to th damages which are the direct an immediate result" of the breach. Thes damages, under defendant's own analysis

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(Footnote Continued)
damages. The CRLI deals with tor damages not contract losses.

would include lost profits if directly caused by the breach. As he explained, Article 728 is regularly construed "strictly to exclude loss of profit when there is no direct causation between the wrongful act and the damages sustained." (Emphasis added).[15] By implication, if plaintiffs prove that Westinghouse was in breach of an alleged promise to provide adequate medical care under the employment contract, and that the breach caused Mr. Basch to lose wages and

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[15]The district court's holding was based, in part, on a statement in Katirai's April 13, 1984 memorandum that the majority of Islamic judicial experts considered lost profits unavailable under Islamic law. Katirai pointed out, however, that Article 728 marked a change in Iranian law. He explained that, prior to the enactment of Article 728, Iranian courts did not award any damages on a claim for loss of profits. According to Katirai, with the enactment of the Civil Code, lost profits may be recovered if directly caused by the breach.

benefits under his employment contract those damages should be recoverable a direct damages under Article 728.[16]

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[16]At first blush, Mr. Katirai's March 13, 1984 memorandum supports the district court's limitation on damages. Mr. Katirai explained that, where a corporation was in breach of a promise to provide medical care to its employees, the corporation would be required to reimburse the employee only for the cost of alternative medical treatment. He noted that "an Iranian court would not hold the corporation liable for any further losses resulting from the breach of a duty to provide medical services except when medical services are not available in the community." (emphasis added). However, because the district court ruled there was a disputed issue of fact on whether there was a promise to provide adequate medical care, the opinion given by Katirai is not controlling. Katirai's analysis was based on a situation where (1) the corporation was in breach of a promise to provide medical care and (2) the employee was able to obtain substitute care. Under his analysis, if substitute medical care was not available to the employee, the scope of Westinghouse's liability as the employer of Basch would broaden. Unlike the hypothetical analyzed by defendant's expert, here the alleged contract was to provide adequate medical

(Footnote Continued)

Given the present state of the record, we hold that it was premature for the district court to have limited plaintiffs' claim for lost wages.[17] The availability vel non of adequate alternative medical services must be determined.

(Footnote Continued)
services. Moreover, there is a disputed issue as to whether, because of defendant's breach, Mr. Basch was unable to obtain substitute care. In other words, Westinghouse (1) allegedly undertook to provide adequate care (not simply "medical care") and, as a result of its berach, (2) allegedly prevented Mr. Basch from obtaining alternative treatment.

[17] In remanding, we leave to the district court in the first instance the task of determining the factors which should be taken into account in calculating lost profits attributable to cut off of wages. Should plaintiffs ultimately succeed on the contract theory, the amount of damages should reflect assumptions as to continuation of employment, salary increments, as well as deductions for expected living expenses, and income taxes (Iranian Federal and State). Obviously, undiminished lost salary is not the figure to be employed.

In anticipation of a May 31, 1983 discovery cutoff and a summer trial date, Westinghouse pressed for a more definitive list of expert witnesses. A motion to compel was filed on March 24, 1983 but later was withdrawn when plaintiffs' counsel agreed to provide supplementation by May 23, 1983. Although or perhaps, more properly, since defendant had not received clarification of Dr. Simonton's exact status--mere fact witnesses or medical expert on the quality of care--defense counsel, sticking properly to his last, arranged a deposition. On May 17, 1983, a letter to plaintiffs' counsel from Donald E. Sharpe, Esq., the partner at the Baltimore law firm of Piper & Marbury who was acting as defendant's trial attorney, revealed that defense counsel had concluded that Dr. Simonton was going to testify as an expert witness. Not having

received the promised supplemental answer clarifying Dr. Simonton's status, Mr. Sharpe and an associate conducted a June 2, 1983 deposition of Dr. Simonton in Florida. At the outset of the deposition, defense counsel were surprised by Dr. Simonton's declaration that "I'm a witness of fact without prejudice to either side in this action." But an associate at Seidenman & Weiss, William Helfance, Esq., confirmed Dr. Simonton's assertion, stating the "Dr. Simonton has not been named at any time as an independent expert witness by the plaintiffs or the plaintiffs' attorney." During the course of the deposition plaintiffs objected to a question by defendant which asked for Dr. Simonton's expert opinion on the quality of care given to the decedent in Iran.

Thwarted in their efforts to obtain testimony from Dr. Simonton as an expert, defense counsel returned to Baltimore only to find the delinquent interrogatory answer.[19] The supplemental response stated that Dr. Simonton "will testify as to the contents of his letter of February 16, 1979. . . . The subject matter contained in his report are based on his factual observations of Philip Basch." On August 17, 1983 plaintiffs designated Dr. Bernard Heckman as their expert witness on the issue of liability.

In response to the discovery tactics, Westinghouse filed a motion for sanctions for plaintiffs' "failure to properly answer interrogatories." A hearing was conducted on October 11,

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[19]The pleading was mailed on June 1, 1983 too late to be received before the deposition.

1983. At the hearing, plaintiffs gave what can only be characterized as a series of inconsistent explanations of Dr. Simonton's status. In addition, plaintiffs' counsel offered no excuse for waiting until June 1, 1983 to file a supplemental answer, and instead chose to point a finger at defense counsel for proceeding with the deposition without ascertaining Dr. Simonton's precise status.

After hearing from both sides, the district court imposed sanctions on plaintiffs' counsel, pursuant to Fed. R. Civ. P. 11 and 37(d), for abuse of the discovery process.[20] The Court first

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[20]Rule 11, recently expanded in 1983, confers broad authority over an attorney who signs a pleading. It states that the attorney must certify that the pleading was not interposed for "any improper purpose" such as to "cause (Footnote Continued)

found that defendant would have deposed Simonton even if he had been designated as exclusively a fact witness. The court found, however, that defendant would have sent an associate, not a partner, to a deposition of a "mere" fact witness. Consequently, the difference between the partner's hourly rate and an associate's rate, amount to $975, was assessed as a sanction. In addition, the district

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(Footnote Continued)
unnecessary delay or needless increase in the cost of litigation." The rule gives the court the power to impose on the attorney "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." Rule 37(d) specifically addresses sanctions for failing to answer interrogatories. Several courts, however, have expanded Rule 37(d) to encompass answers which were evasive or misleading. See, e.g., Airtex Corp. v. Shelley Radiant Ceiling Co., 536 F.2d 145, 155 (7th Cir. 1975); Bell v. Automobile Club of Michigan, 80 F.R.D. 228 (E.D. Mich. 1978).

court ordered plaintiffs' counsel to pay defendant's costs in prosecuting the motion for sanctions--$781, and ruled that Dr. Simonton could not testify at the trial as an expert witness.

Plaintiffs contend that there is no basis in the record to support the imposition of sanctions. Upon a review of the record, however, we cannot, sitting as an appellate court, conclude that the district judge abused his discretion. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976); Hindmon v. National-Ben Franklin Life Ins. Corp., 677 F.2d 617, 620 (7th Cir. 1982); Stillman v. Edmund Scientific Co., 522 F.2d 798, 801 (4th Cir. 1975). The initial interrogatory answer, as found by the district court, caused defense counsel to conclude that Dr. Simonton was going to testify as a medical expert for

plaintiffs. That conclusion was hardly unreasonable, as the district court explained, in that (1) Dr. Simonton was listed in response to the question seeking a list of experts and (2) the answer stated that the doctor's opinion would be based on his medical training. Moreover, the misunderstanding, which plaintiffs' counsel should have been aware of by the nature of Mr. Sharpe's May 17, 1983 letter, was never cured by plaintiffs until it was too late to avoid the unfortunate consequences. Although plaintiffs were not found by the district court to have been intentionally misleading, we agree that counsel's conduct unnecessarily multiplied defendant's cost of litigation by encouraging Sharpe, at his higher hourly rate, to depose the only designated expert witness.

Plaintiffs' counsel also objects to the sanctions chosen by the court. We find, however, that the monetary sanctions imposed on plaintiffs' counsel properly were documented and were tailored narrowly to the extra costs caused by plaintiffs' misconduct in discovery. The portion of the order which bars Dr. Simonton from testifying as an expert will be affirmed as we believe plaintiffs should be held to their representations in the second interrogatory answer and at the deposition.

Westinghouse asks for fees and expenses incurred in connection with defending the instant appeal. See, e.g., Mickwee v. Hsu, 753 F.2d 770 (9th Cir. 1985); Tamari v. Bache & Co. (Lebanon) S.A.C., 729 F.2d 469 (7th Cir. 1984). The present case, however, does not present an appropriate occasion to

penalize counsel for having taken an appeal from the district court's sanction. Seidenman's appeal, although found to be without merit, was not frivolous nor was it interposed to harass defendant or delay implementation of a valid discovery order.

The judgments appealed from are accordingly affirmed except the judgment concerning the recoverability of lost profits in the case liability for contract breach is established. As to that item, the judgment is vacated and the case remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART AND
VACATED AND REMANDED IN PART

APPENDIX D
UNITED STATES DISTRICT COURT
District of Maryland
November 22, 1983

RE: Basch, et al. v. Westinghouse,
Civil Action No. R-80-268

Dear Counsel:

This letter will constitute my ruling on the sanctions to be imposed on plaintiff Basch's attorney pursuant to this Court's October 11, 1983 bench opinion granting defendant's motion for sanctions. The Court has considered the suggestions by both plaintiff's and defendant's counsel.

I have concluded that amended Federal Rule of Civil Procedure 11,[1/] which states in pertinent part that:

[1/] The Supreme Court has ordered that the rule as amended governs not only civil cases commenced after August 1, 1983, but also cases pending on August 1, 1983 where just and practicable. Order
(Footnote Continued)

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions. The signature of any attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable

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(Footnote Continued)
of The Supreme Court, April 28, 1983. This Court concludes that in light of plaintiff's attorney's behavior not only regarding the interrogatory answer, but also throughout the proceedings concerning the motion for sanctions, it is just and practicable to apply the amended rule.

> expenses incurred because of the filing of the pleading motion, or other paper, including a reasonable attorney's fee. (As amended Apr. 20, 1983, eff. Aug. 1, 1983).

as well as Rule 37(d) and the case law I cited in my bench opinion, provides me with ample authority to impose the following sanctions. First, because plaintiff's counsel refused, at the Florida deposition, to permit Dr. Simonton to be deposed as an expert, this Court will not permit Dr. Simonton to appear as an expert witness at trial.

Westinghouse apparently already has paid to Piper & Marbury the cost of the Florida deposition and the motion for sanctions. Therefore, as a second sanction, plaintiff's counsel will pay directly to Westinghouse the reasonable costs, including attorney's fees, incurred as a result of Donald Sharpe's as opposed to a less expensive

associate's attendance at the Florida deposition. This sanction is consistent with this Court's earlier finding that Dr. Simonton's deposition would have been taken anyway, as a fact witness, but by an associate charging half of Mr. Sharpe's $150 per hour rate. Thus, at a rate of $75 per hour, an associate would have billed a total of $975 for thirteen hours of preparation for and attendance at the deposition. However, because the following costs would have been incurred anyway, they are specifically excluded from this ruling:

1. Transportation (including both flight and rental car);
2. Room;
3. Board;
4. Costs of Local Counsel; and
5. Costs of Reporter and Transcript.

The Court notes parenthetically that plaintiff's argument that because both Mr. Sharpe and Ms. Cahill attended the Boston deposition of Dr. Page, a mere

fact witness, it is absurd to claim that Dr. Simonton's deposition would not have been taken had plaintiff not noted him as an expert, also "falls flat" (to borrow plaintiff's attorney's own expression). Plaintiff's own argument justifies this Court's imposing a sanction consisting of both Mr. Sharpe's and Ms. Cahill's fees, and not only Ms. Cahill's. If the practice of Westinghouse or of Piper & Marbury is to send two attorneys, including a senior partner, to depose a mere fact witness, then surely this Court could infer that at least both of those attorneys, or even additional attorneys, would be sent to depose an expert witness.

Plaintiff's attorney also, as a third sanction, will pay the costs defendant incurred in preparing the motion for sanctions, including reasonable attorney's fees. Defendant

represents that its preparation consisted of 1.4 hours of Donald Sharpe's time and 10.4 hours Kathleen Cahill's time. At their respective billing rates of $150 and $55, the total amount Sharpe and Cahill spent on the motion for sanctions was $781.00. Plaintiff's attorney is hereby ordered to pay to Westinghouse that entire amount. The Court cautions plaintiff's attorney, however, that his extreme attenuation of this matter by showering this Chambers with letter after letter, raising essentially the identical points that were raised at the sanctions hearing, warrants my granting defendant any additional expenses. I will not, however, impose any additional expenses as a sanction at this time.

To summarize, the Court hereby orders plaintiff's counsel to pay

directly to Westinghouse the following amounts within 15 days of the date hereof.

1. $975.00 -- The difference between a senior partner's and an associate's preparation for and attendance at the deposition.

2. $781.00 -- cost of preparing motion for sanctions.

In addition, Dr. Simonton will not be permitted to appear as an expert witness in this case.

Very truly yours,

Norman P. Ramsey
United States District Judge

APPENDIX E

Kinsey M. Simonton, M.D.
951 Holly Lane
Boca Raton, Florida 33432
16 February, 1979

Dear Mr. Needle:

I have received your inquiry about Philip Basch.

Mrs. Basch came to my home in Shiraz where I was Visiting Professor of Otolaryngology at Pahlavi University Medical School. At her request I accompanied her to Hafez Hospital, a unit of the University Hospital system, to see Mr. Basch. The hour was late evening.

I found Mr. Basch sitting up in bed. He was cyanotic, respirations rapid and shallow and quite apprehensive. I recall contracting an interne who knew little about Mr. Basch. The Resident Physician was not available. I was able to reach the Staff Physician by telephone. He informed me that cultures had been done

but that no positive results were available to that time. He did agree that I order oxygen therapy to be started. I did so in his name adding my own as countersignature as I was not known at this hospital. Oxygen was not available at Hafez Hospital and the request was relayed to Saadi Hospital which is also associated with the University. The staff Physician there came to see Mr. Basch in a short time and had him transferred to the Respiratory Care Unit at Saadi. I understand that oxygen therapy was started there.

I called at Saadi but was unable to enter the Respiratory Unit. I next heard that Mr. Basch had expired.

The University Hospitals are the best available in Shiraz. Physicians notes are incomplete and irregular. Nurses notes give no information of the patient's condition. Laboratory data is

appended to the record. I regret that I do not recall the data which I saw. I do recall that Mr. Basch was seriously ill with respiratory distress and distended abdomen.

My recent letters to Iran have been returned by the U.S. Postal Service. Letters which I have received have been hand carried out of the country. They tell of postal strike for several months and of disruption of all services within the country. I am not optimistic of your prospects for further information.

Sincerely,

Kinsey M. Simonton

APPENDIX F

(Excerpts from Deposition
of Dr. Bernard Heckman)
(from Court of Appeals
Appendix, A. 213)

Deposition of BERNARD ALVIN HECKMAN, M.D., taken on Tuesday, January 24, 1984.

APPEARANCES:

Jerome J. Seidenman, Esq.
on behalf of the Plaintiffs

Donald E. Sharpe, Esq.,
on behalf of the Defendant

EXAMINATION BY MR. SHARPE

Q Doctor, would you please state your full name and give me your residence as well as your business address.

A My name is Bernard Alvin Heckman. . .

Q What is your educational background?

A I have a bachelor of science degree from George Washington University

in chemistry. I hold a doctor of medicine decree from the University of Virginia School of Medicine in Charlottesville, Virginia. I have a certificate of internship completion from the New York Hospital Cornell Medical Center in New York City. I completed two years of internal medicine residency at that same institution and one year of fellowship in the field of gastroenterology, which is a sub-specialty of internal medicine.

. . . I am certified by the American Board of Internal Medicine as a diplomate of the board, and certified by the American board as a diplomate in the sub-specialty of gastroenterology, as well.

I practice general internal medicine and gastroenterology. I am a fellow of the American College of Physicians. I hold membership in a number of

professional societies, including the American Society of Internal Medicine, the American Gastroenterologic Association, the American Society of Gastrointestinal Endoscopy.

In addition, I am the president of the medical and dental staff at Holy Cross Hospital, Silver Spring, Maryland.

Q Have you published any articles?

A Yes, I have about eight or nine publications in the field of general internal medicine, as well as in my specialty.

. . .Q I show you a report from Dr. Simonton, dated February 16, 1979. . .

. . . So, for those reasons, from the very beginning I find even at Visit One he did not act in a manner which would be appropriate to treat somebody here. At the second visit, after the

diagnosis was established as pneumonia, the patient had not responded to the treatment that was used, and he should have responded. If an organism was present, within 48 or 72 hours one would have expected to see some type of beneficial response if the correct drug had been picked on a shotgun basis. To merely continue the same therapy without making any further investigation, particularly in light of the fact that now a pneumonia was well documented, was even further, in my view, below the standard of care that would have been administered had he been treated here in this country. . . .

(Letter, 2/16/79, Dr. Simonton to Mr. Needle, marked Dr. Heckman Deposition Exhibit 3-C.)

. . . And I want to make one other point clear. If this information is

accurate, particularly the information that was related to us by the ear, nose & throat physician who visited him when he was at Hafez Hospital, Doctor ---

Q Simonton.

A --- Simonton, according to him, when he saw the gentlemen he was in Hafez Hospital receiving what I consider to be very poor care in the sense that he was noted to be cyanotic, by the physician, which is a condition whereby one has a marked lack of oxygen in the blood, and he was receiving no oxygen therapy, because apparently no oxygen therapy was available at that hospital.

That, in point of fact, is what ultimately resulted in his being transferred to the other hospital. But the point I want to make is, if a person remains hypoxic, without oxygen, for a period of time, it is possible that they may develop a condition called shock lung

where the lung tissue is damaged sufficiently by a prolonged period of poor oxygenation that it makes healing very difficult and lessens the person's chances of survival.

So I would say that the supportive care that he received at the last institution was reasonably supportive in the true sense of the word, but prior to that it seems to me that his supportive care was quite limited.

Q When you say, prior to that, you are basing that on Dr. Simonton's letter which recites a single visit the day before the death, is that correct?

A Right. That's all I have.

Q That's all you have.

A I have these two pieces of information. I have the piece of information that he was noted to be blue, by Dr. Simonton, who should be a reliable observer in that regard -- he is a

trained physician -- and I have the piece of information that he was in the hospital where no oxygen therapy was available.

Those are the two pieces of information that I am using when I make the statement that that is not appropriate supportive care. . . .

APPENDIX G

Portions of October 11, 1983 District Court sanctions arguments (From Court of Appeals Appendix, A. 122)

APPEARANCES:

For the Plaintiff:

Jerome J. Seidenman, Esquire
William Helfand, Esquire

For the Defendant:

Donald E. Sharpe, Esquire
C. LaMar Garren, Esquire

THE COURT: Let me ask you two specific questions: Under the circumstances, and in light of the answer you got to your interrogatory 14, would you not have deposed this doctor in any event? You don't know he is hanging out there as a potential expert. He is at least an M.D., so you have got at risk the fact that an M.D. may be asked to testify. . . .

. . . I want to know, however, whether it is not likely that the deposition would have been taken even if Simonton had been identified as a fact witness.

MR. GARREN: The frank answer to your question, Your Honor, is we just don't know. The reason we don't know is two-fold. First of all, if he is identified not as an expert witness and some independent fact witness, we would have the opportunity to approach him, attempt to interview him regarding what his testimony was going to be and then make a decision as to whether or not we wanted to make that part of the record, the pretrial record at last in this proceeding. That was denied us by this abusive discovery process by his designation as an expert. Once designated as an expert, they intend to call our discovery of the expert is thereby

restricted. We have to go through plaintiff's counsel in order to contact him; and that is what we did in this case, Your Honor, by the way. And there was an active involvement of plaintiff's counsel in scheduling his deposition. That, I believe, is the primary reason why we don't know and why even in light of the fact we don't we should be entitled to sanctions.

The second response to your question, Your Honor, is one that is far more practical, and that is given the fact that he is not going -- if he were not a medical expert in the case, it is highly unlikely that Mr. Sharpe, with his billing rate, would have been the one that would have been designated to travel all the way to Florida and spend all this time deposing the medical expert. And I can say with some confidence that that simply would not have occurred; that

either myself or Miss Cahill, who was in the case at the time, would have been the ones to go.

So, the answer to your question is, Your Honor, we don't know, but we were put at that risk by the plaintiff. We believe -- under these circumstances, we believe they should be subject to our motion for sanctions.

THE COURT: Thank you very much.

Mr. Helfand, do you want to be heard, sir?

MR. HELFAND: Yes. . . .

Now, under the Federal Rules of Evidence, as well as common law, particularly the Federal Rules of Evidence, the definition of an expert is rather broad. And under -- I believe it is Federal Rules of Evidence 702, it refers to any person with scientific, technical or other specialized knowledge who can provide assistance to the trier

of fact in understanding the evidence or determining the issues in a case.

Now, I have absolutely no doubt whatsoever that Dr. Simonton, whatever the precise contours of his knowledge and his stature -- testimonial stature in this case, Dr. Simonton was an expert witness and was --

THE COURT: Was what?

MR. HELFAND: Was an expert. Is an expert.

THE COURT: He is an expert witness? In what sense?

MR. HELFAND: In the sense that he is a personal with particular medical knowledge which is not the knowledge normally within the domain of a lay person. And consequently, I think that it was appropriate and proper and above all, perfectly honest for the plaintiff in her Answers to Interrogatories to name

Dr. Simonton in response to interrogatory number 14.

THE COURT: Isn't that a little ingenuous? You know what that interrogatory asked you. It didn't ask you whether there was somebody out there who was an M.D. who witnesses an automobile accident who might be asked whether the light was red or green. It asked you who your expert witnesses were going to be. Expert witnesses, under the rules, testify to opinions. Now, you don't put somebody in who is going to testify to a red light, green light just because he is an M.D. 705 goes on to talk about these people up in 702 and says what they do when they get in court. They testify to opinions. They state the basis for their opinions. It is not whether he is a doctor.

MR. HELFAND: Your Honor, it is not -- I wholeheartedly agree. It is not

the mere fact that Dr. Simonton is an M.D. that would make him an expert in any case under any facts and circumstances. It is precisely because he saw the decedent in this case in Shiraz, Iran. He made certain factual observations; he formed certain opinions. He was able to offer certain opinions which were not the opinion that would normally have been formed by a lay person.

Now, at the deposition, as well as in the February, 1979 letter, which was provided to counsel for Westinghouse long before this deposition occurred, Dr. Simonton stated what his knowledge of the facts and circumstances surrounding observations of Mr. Basch in Shiraz, Iran, were.

THE COURT: You didn't let him answer whether he had an opinion about the quality of medical care rendered to Basch. You interrupted and objected.

MR. HELFAND: I objected, but the doctor was not my client. The doctor is not my witness, and I felt that I was entitled to object to the question. The answer -- the preliminary disclaimer to -- in the plaintiff's original answer to number 14, which opposing counsel seems to want to discount, is that there was no named medical expert in the case. We clearly stated that Monsour Lotfi was being named as an expert witness, and we stated what the subject matter of his testimony would be. We also stated -- and I honestly cannot think of how we could have made it any clearer -- that the plaintiff had not retained a medical expert to testify on their behalf as to the entire basis for their claim.

THE COURT: Read the part that you put in about how you were going to call

Simonton. "The plaintiff may also call K.M. Simonton, M.D. -- then you give his address -- as an expert witness on the issue of liability in this case." How could you have been more explicit about the likelihood of calling K.M. Simonton as an expert witness on liability? What's hedged about that?

MR. HELFAND: Your Honor, he is an expert witness as to the facts and medical observations as well as any other observations which he made. Dr. Simonton's testimony will provide a part of the foundation upon which the named expert of the plaintiffs on the issue of liability will testify. He will state certain facts -- certain conclusions, observations that he made upon which Dr. Heckman who has been named as an expert in this case will testify.

Now, because of the peculiar nature of this case, because of the absence of

many medical records, this is not a case where we can simply provide to the expert witness a packet of medical records from which he can draw various conclusions. It would be a much more difficult task to establish the facts, the facts of medical care, medical treatment of the various circumstances surrounding Mr. Basch's death upon which the expert is to testify. Dr. Simonton's testimony, Dr. Simonton's letter, will provide one of the bases upon which that testimony, that opinion will rest.

THE COURT: Let me ask you this: Assuming somebody who read your answer was not led by the first statement to believe you were calling him as an expert. How are they supposed to read the last answer: "The grounds for his, Simonton's opinion, are based upon his being a medical doctor and personal observation of Phillip Basch." You are

saying there -- who expresses opinions in courtrooms? Experts. You have just said he may be called as an expert witness, and then you say his opinion is based on.

Now, if they weren't misled by your first comment, how could they possible not be led astray by that last comment into thinking that you were naming Simonton -- maybe you were hedging it -- but you were naming Simonton and holding a joker. Somebody had to depose this man to find out what you had with Simonton. It wouldn't help to get a letter saying he was only going to testify about the letter of February '79 when you are already in Florida.

MR. HELFAND: Your Honor, let me just make it absolutely clear, and I don't know the exact date, but the letter had been supplied to counsel months, months, perhaps a year prior to --

THE COURT: I will accept that.

MR. HELFAND: This was not a letter that was dropped on counsel at the last minute.

THE COURT: I know, but the statement in your supplemental answer that what he is going to testify about is what is in that letter. It didn't come until Mr. Sharpe was already in Florida prepared for the deposition. You were down there too.

MR. HELFAND: Yes, Your Honor.

THE COURT: All I am saying to you is -- in fact he had the letter. A letter doesn't tell you what later observations are made, what studies have been made, what expert studies he has made of hospital records in Iran. You have got to find out what is going on.

MR. HELFAND: Your Honor, again, in response to your question, I think that

the way I read the answer, and I am not in any way trying to be evasive, but the answer is that the grounds for his opinion are the fact that he is a medical doctor. This is a man who is a physician by training, by 40 odd years of practical hands-on experience and personal observation of the decedent immediately before his death, his awareness that the hospital setting -- all the surrounding circumstances in this case.

I think in this case it was absolutely clear to everyone that Dr. Simonton's expertise, if we want to call it that, rested upon his observations of Mr. Basch and upon the fact that he was a doctor, that he has knowledge that no one else in this courtroom has since no one else in here, I assume, is a physician. No one else has his specialized experience, training and knowledge that he had.

I also think that it would be disingenuous for opposing counsel to say that I would not under any circumstances have sent someone to take Dr. Simonton's deposition. There have been depositions taken all over in this case, and I am not yielding for one moment on the grounds that there was something evasive about this answer; but I think above all that the deposition absolutely would have been taken of Dr. Simonton.

THE COURT: Isn't it a valid observation, though, that if you are in a very serious case involving claimed medical malpractice that there are all kinds of -- in the hundred some-odd lawyers of Piper and Marbury, somebody with a lower billing rate than Mr. Sharpe to fly to Florida and take a routine fact question deposition -- but you send your lead man if you have got the expert or even an

expert on causal relationship between a death in Iran and the medical treatment rendered by a corporate employer like Westinghouse. You don't sent an associate down to take that kind of deposition of that kind of an expert. Now, maybe your side says we don't need Mr. Seidenman because we know he is not our expert, but you don't give the other side the benefit of saying: he is only a fact witness. If you are running your fact witness, send Ms. Cahill, send somebody. That was my inquiry, really, to both sides. You need to depose this man, but not necessarily at the professional level of sending a top trial partner.

MR. HELFAND: May I respond to that by something that may be outside the record? Approximately one month ago we took Mr. Sharpe noted the deposition of a physician by the name of Dr. Lot Page at

Newton-Wellesly Hospital outside of Boston, Massachusetts. That deposition pertained to an individual who had last seen and supervised Dr. Salami approximately eight or nine years ago.

THE COURT: The death, of course, was about seven years ago, so that puts it pretty close proximity when Basch got the bad treatment from Salami. If you take it back, this guy was his supervisor with a measurable time period before he went to Iran and became a quote, "blue-collar worker," closed quote, white-collar worker; whatever he turns out to be. I don't see anything irrational about that.

MR. HELFAND: No, I am not objecting to his taking the deposition, obviously. It was perfectly acceptable to the plaintiff that he take the deposition. There was no objection whatsoever to it. The point I am trying to make is that

this particular doctor was, number one, not a fact witness to this case; and consequently, I believe of less direct significance to the case. In addition to which, not only did Ms. Cahill attend the deposition, but Mr. Sharpe did as well. Now, this was a deposition which was recognized by all parties to be a relatively brief deposition. I believe the deposition took no more than an hour and a half, perhaps a bit less than that. And defense counsel chose to send not one attorney to represent themselves at the deposition, but two. So, in response to your question as to who might have been sent, the answer, in all candor, is I don't know, Your Honor, whether they would have sent Mr. Sharpe, Ms. Cahill, someone else, two people; I sincerely don't know. But based on the attention that they have fostered on this case at other depositions, I don't think it is

fair to conclude that Mr. Sharpe absolutely would not have gone and someone else would have gone instead.

APPENDIX H

Letters from Defendant's counsel
to Plaintiff's counsel
(From Court of Appeals
Appendix, A. 34,42)

April 27, 1983

Dear Mr. Seidenman:

". . . we are interested in arranging a mutually convenient time to take Dr. Simonton's deposition. Three dates on which we are available are Friday, May 13, 1983; Monday, May 16, 1983; and Tuesday, May 17, 1983.

Very truly yours,

Kathleen M. Cahill

May 17, 1983

Dear Jay:

I was sorry that your office was unable to agree to working out the arrangements for the deposition of One of your experts, Dr. Simonton. When I left the office last week on Wednesday afternoon, there was an agreement that the deposition would take place on Thursday, May 19 at 3:00 p.m. at Dr. Simonton's home in Boca Raton, Florida. These arrangements were confirmed in your letter of May 10.

I understand from Kathleen and from your letter of May 12 that, on Friday, you and Dr. Simonton requested either a postponement of the deposition or its rescheduling in Duxbury, Massachusetts. Your letter is critical of Kathleen's suggestion that the deposition be taken in Boston because that would require

Dr. Simonton to drive approximately 1 hour from Duxbury. I do not consider Kathleen's suggestion unreasonable and believe it would have facilitated matters greatly. It would have saved approximately two hours of travel time for each counsel which could have been used for the deposition and it would have permitted easy access to a court reporter and a suitable office.

Nevertheless, I attempted to resolve the matter so that we could proceed with the discovery. I made arrangements for the deposition to be taken at 11:00 a.m. in Duxbury in the offices of James T. Pye, Esquire. The time was selected to enable each of us to catch either of the two early morning flights to Boston, still have sufficient time to drive to Duxbury, have ample time for the deposition and return to Boston to catch

a return flight to Baltimore at a reasonable hour.

Mr. Helfand of your office initially advised me that the deposition could not proceed before 2:00 p.m. I explained to him my reasons for selecting 11:00 a.m. and asked him to reconsider so that we could commence at 11:00 or soon thereafter. He subsequently called and advised me that the deposition would not proceed before 2:00 p.m. Frankly, I do not see how we can work out these kinds of problems if only one side is willing to compromise its position. In any event, rather than continuing to harangue, I advised Mr. Helfand that I would formally notice the deposition.

Accordingly, I have enclosed a notice to take Dr. Simonton's deposition on June 2 at 10:00 a.m.

Very truly yours,

Donald E. Sharpe